RECORD AND BRIEFS

Supreme Court, U.S.
FILED
AUG 25 2015
OFFICE OF THE CLERK

No. 14-419

In the Supreme Court of the United States

SILA LUIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF NEW YORK COUNCIL OF DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 250 lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases in the federal courts of New York.[1] NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the proper administration of criminal justice. NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. NYCDL's *amicus* briefs have been cited by this Court or by concurring or dissenting justices in cases such as *Kaley v. United States*, 134 S.Ct. 1090, 1104, 1112 (2014) (opinion of the Court and Roberts, C.J., dissenting), *Rita v. United States*, 551 U.S. 338, 373 n.3 (2007) (Scalia, J., concurring in the judgment), and *United States v. Booker*, 543 U.S. 220, 266 (2005).

NYCDL has long advocated for the recognition of due process rights where the government restrains funds necessary for those accused of crime to retain counsel. More than 25 years ago, when this Court first addressed the constitutionality of pretrial restraints, NYCDL submitted an *amicus* brief urging this Court to

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[1] This brief is filed with the written consent of the parties. Pursuant to Sup. Ct. R. 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

require a pretrial, adversarial hearing at which the defendant could challenge the basis for any such restraints. *See* Brief of the Committees on Criminal Advocacy, and Criminal Law of the Association of the Bar of the City of New York, et al. as Amici Curiae in Support of Respondent, *United States v. Monsanto*, 491 U.S. 600 (1989) (No. 88-454). The NYCDL also submitted an *amicus* brief two terms ago when this Court returned to the same issue in *Kaley*. Brief of New York Council of Defense Lawyers as Amicus Curiae in Support of Petitioner, *Kaley v. United States*, 134 S.Ct. 1090 (2014) (No. 12-464).

SUMMARY OF ARGUMENT

We understand that one of the principal issues before the Court is whether the government, in anticipation of pursuing criminal charges, may restrain funds and property of a criminal defendant not traceable in any way to criminal activity and thereby prevent the defendant from using such resources to retain counsel of his or her choice in the criminal proceedings to follow. From our perspective, the use of such restraints represents a bold new development in criminal procedure – one that threatens to diminish the role of the private bar in shaping the criminal justice system and in contributing to the development of criminal law, one that threatens traditional constitutional principles, and one that makes criminal defense work very difficult if not impossible as a practical matter.

It has long been accepted that the government may restrain tainted assets – assets allegedly connected to criminal activity – at the outset of criminal proceedings. It is far different to suggest that

untainted assets – clean funds and property, not alleged to be connected to any crime – may be removed from and denied to a defendant who depends on them to obtain representation to contest criminal charges. Restraining a defendant's otherwise available and legitimate resources in this manner is in direct derogation of the Sixth Amendment's guarantee that, "[i]n all criminal prosecutions, the accused shall enjoy the right . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. If permitted in this case, the government will enjoy the power to pursue similar restraints in a wide range of other federal criminal cases. Regardless of whether the government employs that power broadly or selectively, it will limit the role and effectiveness of the criminal defense bar and create numerous obstacles burdening the work of the practitioner. The result will be to the detriment not only of individuals accused of crime, but of the general public which depends on a strong defense bar as a bulwark of liberty to ensure the integrity of the criminal justice system. Our traditional constitutional understanding – that individuals can and must use their own private funds to pay for their defense – would be replaced by one which generally assumes that the defense function will be subsidized by public funds made available to court-appointed lawyers.

ARGUMENT

I. Restraint Of Legitimate Assets Will Impede The Role And Effectiveness Of The Criminal Defense Bar

Section 1345 of Title 18, the statutory provision the government relies upon to justify pretrial restraint of untainted assets, applies in a broad range of federal criminal cases. By its terms, it can be invoked in almost any case said to involve a financial institution or a health care insurer or provider. 18 U.S.C. § 1345(a)(2) (permitting civil forfeiture in any case involving "a banking law violation (as defined in [18 U.S.C. § 3322(d)]), or a Federal health care offense"). The Department of Justice describes the statute as generally applying to "fraud-type cases." *Asset Forfeiture Policy Manual* (2013), p. 171 n.14. Federal fraud cases often concern conduct spanning considerable time periods, financial complexities, and thousands of documents and computer records offered as evidence. Their defense requires the assistance of counsel with considerable experience and substantial resources.

Though a tool used by the government in criminal cases, the restraints available in Section 1345 depend for their implementation on the commencement of parallel civil proceedings. 18 U.S.C. § 1345(a)(2). It is often observed that federal prosecutors prefer the civil mechanisms of Section 1345 to the more complicated and limited avenues for pretrial restraint offered by the criminal forfeiture statutes. *See* David Smith, *Prosecution and Defense of Forfeiture Cases*, ¶ 14.02A, Restraining Orders and Injunctions Under 18 U.S.C. § 1345(a)(2) (observing that the government "frequently

obtains an injunction or a restraining order under 18 U.S.C. § 1345(a)(2)" because it is a "powerful statute [that] affords the government important advantages in comparison with the restraining order provisions of the criminal forfeiture statutes").

By diverting a criminal case to a civil courtroom, Section 1345 has immediate consequences for the individual accused of crime seeking to use his or her own legitimate funds to hire a lawyer. For starters, major steps can be taken behind closed doors without the knowledge of the defendant. In the present case against Ms. Luis, for example, the government filed its civil complaint under seal along with an *ex parte* motion seeking a temporary restraining order. The defendant had no knowledge of or role in the proceedings, and a restraining order was issued before she could make any challenge. *See* Pet'r's Br. at 6. Although civil defendants generally enjoy the right to challenge a temporary restraining order at a subsequent preliminary injunction hearing, in a sense it is already too late: their assets having been restrained at the prior *ex parte* proceeding, they lack access to funds needed to pay for legal representation at any subsequent hearing. Few lawyers will jump in to challenge restraints aggressively when there can be no promise that they will be paid. Moreover, while defendants have a constitutional right to counsel in criminal proceedings, they do not enjoy the same right in civil proceedings and thus are often forced to contest a preliminary injunction on a *pro se* basis.

It should be emphasized that, in seeking such restraints, the government often has the option of freezing *all* of a defendants' assets, even where a

defendant is alleged to have had only a limited role in the crime, and even where such assets are far in excess of the proceeds the defendant is alleged to have obtained from the crime. In conspiracy offenses of the type covered by Section 1345, each defendant can be held responsible for and required to forfeit not only the amount he or she is alleged to have personally obtained from the crime, but the entire amount allegedly obtained by the conspiracy as a whole. *See, e.g.*, *United States v. Contorinis*, 692 F.3d 136, 147 (2d Cir. 2012).[2] In short, when the government restrains untainted assets, it is not limited to an amount which serves as a proxy for a defendant's ill-gotten gains, as is the case when it restrains only tainted assets. Instead, the government has the discretion to seek to restrain the maximum forfeitable amount associated with the crime.

When under such restraints at the outset of a case, individuals accused of crime are seldom in a position to pay for an experienced lawyer or to retain counsel of their choice. As a practical matter, criminal defense attorneys require funds to represent their clients and collect their fees from their clients' untainted assets. Few lawyers can afford to work for free. Restraint of untainted assets generally means that an individual accused of crime will have limited if any options from

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[2] Indeed, in some Circuits, defendants may be jointly liable for purposes of forfeiture for losses that were not reasonably foreseeable to them. *See United States v. Browne*, 505 F.3d 1229, 1277-80 (11th Cir. 2007) (forfeiture not subject to same test of reasonable foreseeability as substantive liability for acts of co-conspirators); *United States v. Spano*, 421 F.3d 599, 603 (7th Cir. 2005) (suggesting, but stopping short of instituting, such a rule).

among the private bar. The significance of this fact cannot be overstated. As Chief Justice Roberts observed, "An individual facing serious criminal charges brought by the United States has little but the Constitution and his attorney standing between him and prison. He might readily give all he owns to defend himself." *Kaley*, 134 S. Ct. at 1105 (Roberts, C.J., dissenting). Beyond the individual, all citizens benefit from a robust and independent criminal defense bar as a check on government power and a protector of constitutional rights.

The ability to restrain untainted assets gives the government great leverage in criminal cases. It can exercise its discretion in determining when to seek such restraints and in determining the amount of assets to put under restraint. In cases where it has the authority to seek broad restraints, it holds the power to financially cripple a defendant from the outset, depriving him or her of the means to hire any lawyer at all. In other cases, even where the government chooses not to seek to restrain all of a defendant's assets, it essentially holds the power to determine the size of the budget the defendant will have available, during the pending legal proceedings, to cover living expenses for herself and her family and to pay for legal services. There might well be cases where the government is more inclined to release funds because a defendant has indicated a willingness to plead guilty or a willingness to cooperate against his co-defendants. *See* William Genego, *The New Adversary*, 54 Brooklyn L. Rev. 781, 812-813 (1988) (survey reporting that attorneys had elected not to take certain cases because of concerns about the application of forfeiture statutes to attorneys' fees, and reporting that plea bargains had been offered

that would exempt attorneys' fees from forfeiture with the understanding that, absent a plea, such fees would be forfeited). The integrity of the private bar is undermined to the extent that lawyers need to negotiate with the government in order to receive payment for their services.

By limiting a defendant's financial resources, the government limits his or her choice of counsel and the type of defense that can be prepared. A defendant with limited resources may be inclined to hire a lawyer with less experience if the price is right. A defendant with limited resources may be less inclined to pay for a "trial lawyer" and more inclined to hire a "deal-maker" even where a case might otherwise be defensible. Lawyers retained on limited budgets tend to have more limited options than lawyers who have full access to their client's untainted resources. In financial fraud cases brought by the Department of Justice, it is not uncommon for voluminous documents and entire computer systems to be seized, including reams of data that must be reviewed as potential evidence. Lawyers often require staff to help review these materials. Such staff is difficult to obtain with only limited funds. Lawyers also often rely on investigators to find and interview potential witnesses. Investigators are difficult to hire when funds are low.

The result is a shift in the concept of what it means to retain a lawyer of one's choice. Traditional Sixth Amendment jurisprudence champions the right of the individual to retain a lawyer of his or her choice. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006) (Sixth Amendment commands "that the accused be defended by the counsel he believes to be best");

Wheat v. United States, 486 U.S. 153, 159 (1988) (Sixth Amendment protections include "the right to select and be represented by one's preferred attorney"); *Powell v. Alabama*, 287 U.S. 45, 53 (1932) ("[A] defendant should be afforded a fair opportunity to secure counsel of his own choice."). The government's broad discretion in determining whether and to what extent to seek to restrain a defendant's untainted assets, on the other hand, effectively places a large part of that choice in the hands of the government, because it controls the purse strings.

Notably, before Andrew Weissmann, Chief of the Fraud Section of the Department of Justice's Criminal Division, held his current position, he remarked in public testimony before the House of Representatives that the "long tradition and jurisprudence of pre-conviction asset restraint and forfeiture are grounded exclusively in the recognition that the funds to be seized are 'tainted.'" He observed that "[t]his requirement has cabined prosecutorial discretion by limiting the universe of restrainable funds to those traceable to the crime committed." He further observed that a departure from this requirement carries with it "enormous potential for abuse." *Prosecutorial Authority to "Preserve Assets" for Restitution: Hearing on Legislative Proposals to Amend Federal Restitution Laws Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 47-48 (2008) (prepared statement of Andrew Weissmann, Partner, Jenner & Block LLP).

II. Limiting The Role Of The Private Bar In Criminal Cases Would Alter A Longstanding Constitutional Paradigm

Throughout most of this nation's history, individuals accused of crime have had no choice but to rely on their own private resources to fund their defense. The Sixth Amendment right to counsel was historically premised on the assumption that individuals would use their own untainted assets to fulfill this constitutional right. *See* Pet'r's Br. at 24-25. Public funding of defense lawyers was a relatively late phenomenon in our constitutional jurisprudence, arising only in the twentieth century. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942)). To the extent a public criminal defense bar has been developed, comprised mainly of federal public defender organizations and court-appointed lawyers, it was never intended as a resource for individuals with extensive untainted assets. Rather, such programs were seen as necessary to safeguard the Sixth Amendment rights of indigent defendants who lacked financial means. *See Gideon*, 372 U.S. at 344 (guaranteeing right to counsel for "poor man charged with crime"); 18 U.S.C. § 3006A(a) (mandating plans in each district to provide counsel for persons "financially unable to obtain adequate representation"); *About Us*, Federal Defenders of New York (August 19, 2015, 2:33 PM), http://federaldefendersny.org/about-us/ (describing Federal Defenders of New York as "dedicated solely to defending poor people accused of federal crimes").

Today, when the government restrains the untainted assets of persons with financial means, it

appears to do so on the assumption that there is a public safety net for the provision of legal services. This assumption is consistent neither with the Sixth Amendment's historic commitment to a right to privately funded counsel, nor with the intended purpose of a publicly-subsidized criminal defense bar. Many federal public defender organizations and lawyers appointed under the Criminal Justice Act serve numerous clients and have only limited resources. Requiring them to represent defendants in large financial fraud cases – often requiring the review and analysis of extensive data and documents – puts a burden on their ability to represent their larger client base. Although one way to address this issue would be to increase funding for federal public defender organizations and court-appointed lawyers in order to accommodate such cases, such funds would ultimately have to come from tax dollars, with the general public paying an increased share of the cost of criminal defense. One can debate whether this makes good policy. For present purposes, it suffices to note that the broad use of restraints under Section 1345, effectively removing private assets from the pool of resources that can be used to support the defense of criminal cases, presages a fundamental change in the way that legal services have traditionally been delivered within the criminal justice system.

CONCLUSION

To the extent that pretrial restraint of untainted assets deprives criminal defendants of counsel of their choice, it diminishes the role of the private defense bar in federal criminal cases, where they have traditionally served as an independent voice of important

constitutional rights. At the same time, the use of such restraints increases the power and leverage of prosecutors in a way that impedes the delivery of legal services to those accused of crime.

Respectfully submitted,

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August 25, 2015